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Concurrency and Its Relation to Growth Management

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Concurrency and Its Relation to Growth Management

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I. INTRODUCTION

Florida's explosive population increase over the last few decades has necessitated a new outlook on how state and local governments plan for and control their future. With the many different types of land within the state, the need for an overall coherent plan, which provides for the needs of each locality, is obvious. In response to this issue, the Florida Legislature adopted the Local Government Comprehensive Planning and Land Development Regulation Act ("Act").[1]

One of the major legal doctrines arising in the context of the Act is the law of concurrency. Concurrency is "land use regulation which controls the timing of property development and population growth. Its purpose is to ensure that certain types of public facilities and services needed to serve new residents are constructed and made available contemporaneously with the impact of new development."[2] It has been described as the "teeth" of Florida's growth management system.[3] In other words, concurrency

1. FLA. STAT. §§ 163.3161-.3243 (1995).

2. H. Glenn Boggs, II & Robert C. Apgar, *Concurrency and Growth Management: A Lawyer's Primer*, 7 J. LAND USE & ENVTL. L. 1, 1 (1991) [hereinafter Boggs & Apgar].

3. *Id.*

regulations set minimums for developments as to what public service infrastructure must be in place, or planned to be in place, to compensate for the burdensome impact caused by the new development. These concurrency requirements are set forth in the *Florida Statutes*.[4]

This article will begin by examining the history and development of the law of concurrency in Florida which includes an overview of the relevant *Florida Statutes*. Part II will follow with a detailed analysis of the landmark case of *Golden v. Planning Board*.[5] From this decision, the emphasis will turn to Florida case law of the taking remedy and how it applies to the law of concurrency. Finally, this paper will conclude with a discussion of the problem of overcrowded schools plaguing Florida, and the possibility of adding a mandatory capital school element to Florida's concurrency law.

II. HISTORY

During the early years of Florida's population explosion of the 1950s and 1960s, little was done by the Florida Legislature to regulate land use on a state-wide basis.[6] Instead, the state relied on the municipalities' authority to exercise their police power to regulate local land use.[7] However, in 1969, the Florida Legislature attempted to create more consistency in land use decisions by giving local governments the option to participate in comprehensive land use planning, but it did so without providing state-sponsored funding to finance the initiative.[8] Without this funding, uniform land use controls were slow to develop and as late as 1973, "two-thirds of the state had no land use controls whatsoever and ad hoc decision-making, regarding development, predominated throughout the state."[9]

In 1972, the Florida Legislature enacted the Florida Environmental Land and Water Act.[10] With it came the creation of the "Critical Area" program and the "Development of Regional Impact" program, two state-run

4. FLA. STAT. § 163.3180.

5. 285 N.E.2d 291 (N.Y. 1972).

6. Boggs & Apgar, *supra* note 2, at 3.

7. *See* S.A. Healy Co. v. Town of Highland Beach, 355 So. 2d 813, 814 (Fla. 4th Dist. Ct. App. 1978) (authorizing use of police power to restrict use of land); *see also* Cooper v. Sinclair, 66 So. 2d 702, 705 (Fla.) (holding land use regulation adopted municipality to be valid as a "reasonable exercise of police power"), *cert. denied*, 346 U.S. 867 (1953).

8. Boggs & Apgar, *supra* note 2, at 3 (quoting Terrell K. Arline, *The Consistency Mandate of the Local Government Comprehensive Planning Act*, 55 FLA. B.J. 661, 661 (Oct. 1981)).

9. *Id.*

10. FLA. STAT. §§ 380.012-.10 (1972).

programs designed to monitor Florida's local growth management and land use regulation in certain areas of "critical concern" and major development.[11] Through these programs, the state gained valuable insight into the impact of development on local infrastructure. It used this insight to develop initiatives designed to coordinate development with the implementation of municipal services and facilities.[12] These initiatives were later reflected in the Local Government Comprehensive Planning and Land Development Regulation Act.[13]

Arising from the efforts of the legislature to address these land use regulations problems, Florida passed the Local Government Comprehensive Planning Act in 1975.[14] This statute required every local government in Florida to "adopt and implement a comprehensive plan to guide and control future development."[15] The statute did not, however, set forth any "concurrency" requirements. It did, however, provide that any land use regulations adopted or amended by a Florida municipality must be consistent with the state's adopted comprehensive plan.[16]

In 1985, following a substantial overhaul of the state's growth management section of the statutes, the legislature renamed the Act as the "Local Government Comprehensive Planning and Land Development Regulation Act" ("1985 Act").[17] The 1985 Act provided that each of the municipalities adopt a comprehensive plan and submit it to the state for approval,[18] and its adopted local plans must comply with the State Comprehensive Plan ("Plan").[19] It further defined and distinguished the state's and the municipality's authority and responsibilities.[20] In addition, the legislature added provisions making it possible for any "aggrieved or adversely affected party" to challenge the validity of the local comprehensive plan, the land development regulations, and the local government development orders.[21] The 1985 Act required the local plan to include a capital improvements element and an established level of service standard

11. Boggs & Apgar, *supra* note 2, at 4 nn.19-20.
12. *Id.* at 4.
13. FLA. STAT. § 163.3161.
14. 1975 Fla. Laws ch. 75-257.
15. Boggs & Apgar, *supra* note 2, at 5 (quoting Arline, *supra* note 8, at 661).
16. *Id.*
17. Ch. 85-55, § 1, 1985 Fla. Laws 207, 207 (current version at FLA. STAT. § 163.3161 (1995)).
18. FLA. STAT. § 163.3184.
19. *Id.* § 163.3177.
20. *Id.* § 163.3167(1).
21. *Id.* § 163.3215.

for certain public facilities and services.[22] The 1985 Act also prohibited local governments from issuing a development order for any development which would reduce the number of available public service facilities to a level below the minimums set by the comprehensive plan.[23]

The Plan[24] was enacted to preserve the state's natural resources and enhance the quality of life by directing development to areas which already have in place, or have agreements to provide, "the land and water resources, fiscal abilities, and service capacity to accommodate growth in an environmentally acceptable manner."[25] The Plan provides that existing facilities should be preserved and that new facilities be planned for and financed "to serve residents in a timely, orderly, and efficient manner."[26] The 1985 Act, working in conjunction with the State Comprehensive Plan, seemed to accomplish the overall goal of increasing the consistency of land use planning decisions in the state, while still reserving some discretion for each locality. Thus, with this legislation came Florida's foundation for stability in land use decisions as well as an opportunity for growth in a more responsible and efficient manner.

Although the 1985 Act clearly seemed to require a certain level of "concurrency," the term itself was not expressed in the statutes until it was included in the 1986 amendment's legislative "intent" language:

> It is the intent of the Legislature that public facilities and services needed to support development shall be available *concurrent* with the impacts of such development . . . . In meeting this intent, public facility and service availability shall be deemed sufficient if the public facilities and services for a development are phased, or the development is phased, so that the public facilities and those related services which are deemed necessary by the local government to operate the facilities necessitated by that development are available *concurrent* with the impacts of the development.[27]

While this newly adopted language sheds some light on the legislature's intentions implicit in the two sections of the statutes, it left some confusion as to the specific requisite public services. Because of this, the Department

22. *Id.* § 163.3177(3)(a).
23. FLA. STAT. § 163.3202(2)(g).
24. *See* FLA. STAT. §§ 187.101-.201 (1995).
25. *Id.* § 187.201(16)(a).
26. *Id.* § 187.201(18)(a).
27. *Id.* § 163.3177(10)(h) (1986) (emphasis added).

of Community Affairs ("DCA")[28] was left to develop the concurrency doctrine through its interpretation of local land use regulations.

Much of the law of concurrency, as interpreted by the DCA, was confirmed by the legislature in 1993.[29] The legislature provided that, as a matter of state law, concurrency applies to seven forms of public infrastructure: 1) potable water; 2) sanitary sewer; 3) solid waste; 4) drainage; 5) parks and recreation facilities; 6) roads; and in certain jurisdictions, 7) mass transit.[30] In other words, these are the only public services which must comply with the minimum level of service standards set forth in the Local Government Comprehensive Planning and Land Development Regulation Act before a municipality may issue a development order.

III. CASE LAW

A. Golden v. Planning Board

Several years prior to Florida's adoption of the Local Government Comprehensive Planning and Land Development Regulation Act, a small town in New York adopted an ordinance outlining a specific plan to provide for the capitalization and implementation of all public service facilities within the town to be completed within an eighteen year period.[31] To aid in the construction of this plan, Ramapo conducted studies of the town's "existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends" and these studies were ultimately reflected in the plan.[32] In essence, the Ramapo ordinance imposed restrictions on residential development that corresponded to the availability of the specified public service facilities.[33] In other words, the restriction effectively precluded landowners from developing their property until the necessary municipal services were provided.

The ordinance required that in order to develop land in Ramapo, developers must apply for and receive a "special permit" for new residential

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28. This state agency, established by the Florida Environmental Land and Water Management Act of 1972, ch. 72-317, §1, 1972 Fla. Laws 1162, 1162 (codified at FLA. STAT. §§ 380.012-.10 (1972)), was created to implement the Development of Regional Impact program and made recommendations of specific statewide guidelines based on studies of the impacts of development on the local environment. *See* FLA. STAT. § 380.06(2) (1995).

29. FLA. STAT. § 163.3180.

30. *Id.* § 163.3180(1).

31. Golden v. Planning Bd., 285 N.E.2d 291, 294-95 (N.Y. 1972).

32. *Id.* at 294.

33. *Id.* at 294-95.

development.[34] To receive the "special permit," the proposed development must have accrued a certain number of points based on the availability of certain public-service facilities.[35] Points were assigned to the proposed development depending on its distance from requisite public service facilities.[36] The five required public facilities were: "(1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) State, county, or town roads—major, secondary or collector; and, (5) firehouses."[37]

In *Golden*, a facial attack against the validity of the ordinance was brought by property owners who were denied approval of an application for a special permit to develop a subdivision on their property, because the city lacked the time and money to provide necessary public services and facilities at a pace commensurate with increased public need.[38] Although the special term sustained the ordinance, the appellate division treated the proceeding as an action for declaratory judgment and reversed.[39] The decision was then appealed by the town to the Court of Appeals of New York Court.[40]

The Court of Appeals of New York first noted that the ordinance was designed with certain "savings and remedial" provisions to protect the restrictions from being potentially unconstitutional for unreasonableness.[41] For example, the planning board could issue special permits, vesting a present right to develop at some future date when development is scheduled to meet its minimum point criteria.[42] Accordingly, these special permits were assignable. The board also deemed improvements scheduled for completion within one year complete and developers always had the option of providing the necessary improvements themselves to meet the requisite point minimums.[43] Variances on point requirements were also available upon application to the board so long as the variance would be consistent with the ongoing plan.[44]

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34. *Id.* at 295.
35. *Id.*
36. *Golden*, 285 N.E.2d at 295.
37. *Id.*
38. *Id.* at 301.
39. Golden v. Planning Bd., 324 N.Y.S.2d 178, 186 (App. Div. 1971).
40. *Golden*, 285 N.E.2d at 291.
41. *Id.* at 296.
42. *Id.*
43. *Id.*
44. *Id.*

Notwithstanding these options to circumvent the restrictions imposed by the ordinance, the landowners argued that these restrictions were intended to control population growth within the town, and thus an ultra vires objective of the zoning enabling legislation. The court of appeals disagreed, however, stating that although there is no express authorization in the zoning enabling legislation for the land use controls adopted:

> The power to restrict and regulate conferred [by the Town Law] includes . . . by way of necessary implication, the authority to direct the growth of population for the purposes indicated, within the confines of the township. It is the matrix of land use restrictions, common to each of the enumerated powers and sanctioned goals, a necessary concomitant to the municipalities' recognized authority to determine the lines along which local development shall proceed, though it may divert it from its natural course.[45]

From this language, it appears that the court allows the town a significant amount of leeway in exercising its zoning power. Further, by deferring to the quasi-legislative nature of Ramapo's Planning Board, the court is implying that the local government is best suited to establish boundaries and guidelines for development, while still requiring that the ordinance finds it basis within the perimeters of current zoning enabling legislation.

The landowners' next argument was that recent shifts in population, combined with inconsistent land use policies, resulted in distorted growth patterns and undermined efforts in solving regional and state growth control problems.[46] The court dealt with this argument by emphasizing the seemingly obvious fact that undirected growth does not necessarily lead to controlled growth patterns.[47] The court reasoned that even if it did strike the ordinance, as the landowners would have it do, the absence of such an

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45. *Golden*, 285 N.E.2d at 297.

46. *Id.* at 299. The state and regional growth control problems asserted by the landowners included: pollution controls, adequate housing, and public transportation. *Id.* The Florida Legislature seemed to avoid this problem by adopting the State Comprehensive Plan and requiring each municipality to adopt a comprehensive plan that conforms with it. This conformity requirement creates consistency throughout the state and allows local governments to have a real chance of controlling and alleviating some of the problems purported by the landowners in the instant case.

47. *Id.* at 300. Another common misconception is that adequate public service facilities in a growing area are implemented as a matter of course.

ordinance would not guarantee that problems of broad public interest would be solved.[48]

For example, suppose that a community suddenly attracts an influx of new citizens requiring new residential development and it has no land use controls to delegate which public facilities must be in place and how they should be placed in accordance with the population distribution. Suppose further that the local government has only one fire truck available to the entire community, and it is called to three different fires at the same time. The community may be perfectly constructed so that a car can travel from one side of the community to the other without delay, however, even if the fire truck can get to the first fire immediately, the other two fires will have burned the houses to the ground. If a community has a local comprehensive plan which requires a certain number of fire stations be in place prior to, or in conjunction with, new development then this disaster will not occur.

Consider another example involving public parks. Suppose that on a beautiful fall afternoon a large number of the citizens decide to spend the day at the community park. What if the local government has not provided adequate park space under its comprehensive plan to handle all of its citizens? Obviously, the local citizens will be subject to overcrowding and all of the problems that accompany it.[49] From the preceding examples, it is obvious that land use controls, such as the ones adopted by the town of Ramapo, serve distinct advantages and perhaps should be included in every town's comprehensive plan.

The *Golden* court subjected the ordinance to rational basis scrutiny. The court renewed its deference to the "considered deliberations" of the plan's progenitors, deeming matters of land use and development particularly suited to the "expertise of students of city and suburban planning and thus well within the legislative prerogative."[50] Accordingly, the ordinance is presumed to be a valid exercise of police power.[51] Therefore, the burden of proving the ordinance's unconstitutionality rests with the challengers to prove that the ordinance fails to advance a legitimate state interest.[52]

It was agreed that the ordinance advanced legitimate zoning purposes because it assured that any newly built residence would have adequate public facilities. The landowners conceded that the zoning power,

48. *Id.* at 299-300.

49. Examples of overcrowding problems are: increased littering, traffic congestion in and around the park, and injuries related to overcrowding within the park.

50. *Golden*, 285 N.E.2d at 301.

51. *Id.*

52. *Id.*

incorporated by the ordinance, included reasonable restrictions on private property, exacted to further a well-conceived plan and to benefit the public welfare.[53] However, they argued that this ordinance went too far, in that the city was seeking to avoid the financial burden and responsibility of providing public services when needed.[54]

The court upheld the ordinance.[55] It reasoned that it is in "the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district . . . [which] invariably impede the forces of natural growth."[56] So long as the regulations are reasonable and necessary to benefit the welfare of the community, such regulations have been sustained.[57] The court put this "zoning ordinance" into context by holding it to be "inextricably bound to the dynamics of community life and [that] its function is to guide, not to isolate or facilitate efforts at avoiding the ordinary incidents of growth."[58] However, the court's determination of a restriction's validity was determined based on its purpose and its impacts on the community and the general public. The court concluded that:

> where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased growth" and hence, the challenged ordinance is not violative of the Federal and State Constitutions.[59]

Thus, the ordinance passed constitutional muster.

Due to the constitutional nature of the decision, authority to implement such programs within a municipality's growth management scheme became apparent under standard zoning enabling legislation.[60] However, the court did not rule on the ordinance's validity as applied. Thus, while the authority existed implicitly in standard zoning enabling legislation to adopt such an

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53. *Id.*
54. *Id.*
55. *Golden*, 285 N.E.2d at 304-05.
56. *Id.* at 301 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).
57. *Id.*
58. *Id.* at 302.
59. *Id.* at 304-05. Ironically, the town of Ramapo was forced to abandon this plan due to a series of natural disasters which overburdened its financial resources. DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 612 (3d ed. 1990).
60. *See, e.g.*, FLA. STAT. §§ 163.3161-.3243.

ordinance, it seems that an aggrieved landholder may still challenge such ordinance, as applied to his property, as an arbitrary and unreasonable restriction. In other words, such regulations may not be used to mask an exclusionary scheme such as preventing low income or minority groups from moving into an area. It seems clear that such regulation would be stricken.[61]

B. *Florida Law*

1. Standard of Review

This author has discovered no current Florida appellate decisions which have specifically ruled on the constitutionality of Florida's concurrency statute. However, Florida appellate decisions, examining zoning regulations, seem to indicate a strong tendency in favor of the validity of comprehensive plans by requiring strict compliance.[62] For instance, in *Machado v. Musgrove*,[63] where landowners sought to have their land rezoned to allow for office buildings, the court held:

> The test in reviewing a challenge to a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land use plan is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies.[64]

Accordingly, the court placed the burden of proof on the party seeking the zoning change to show that the proposed development strictly conforms with the elements of the local comprehensive plan.[65] Furthermore, in determining whether the evidence provided by that party is actually

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61. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 505 (1975) (indicating where immediate harm is suffered by members of minority group attempting to attain housing in an area which they are illegally excluded, they may have standing to challenge zoning regulation). It is also possible that such a regulation may be deemed as a taking of the landowner's property. *See* discussion *infra* part III.B.2.-3.

62. *E.g.*, White v. Metropolitan Dade County, 563 So. 2d 117, 128 (Fla. 3d Dist. Ct. App. 1990).

63. 519 So. 2d 629 (Fla. 3d Dist. Ct. App. 1987), *review denied*, 529 So. 2d 694 (Fla. 1988).

64. *Id.* at 632.

65. *Id.*

consistent with the plan, the court required the stricter standard, not the traditional "fairly debatable" standard.[66] The court reasoned that to truly be consistent with the plan, the regulation should not "deviate or depart in any direction or degree" from the parameters set by the plan, and thus an increased standard is necessary.[67]

In essence, this type of judicial scrutiny affords much respect to a local comprehensive plan. By requiring strict conformity with each element of the local comprehensive plan, and placing the burden of proving consistency with the plan on the rezoning applicants, the court is implying that the plan is an essential element of the growth management process not to be easily overcome. More importantly, it seems to further expand a municipality's authority to regulate zoning through its local comprehensive plan. The plan's drafters already have the ability to (and presumably do) perform in-depth studies of the community's land use and growth management needs.[68] Once they have evaluated these needs, they can incorporate appropriate regulations in their comprehensive plan to help correct localized problems. The state has thus provided the municipalities with a powerful pen. However, by retaining the right to review each plan, the state has also secured overall conformity. In so acting, the legislature has recognized these plans as having the utmost significance in local land use decision-making, which is a strong indication that local comprehensive plans are valid.

This judicial approach toward local comprehensive plans by the court makes sense. While some would argue that a strict type of scrutiny by the courts is just another governmental intrusion further burdening the typical landholder, the opposite may in fact be true. First, land use problems typically arise at the local level. If land use regulations are controlled strictly at the state level, adequate protection of local interests may not be realized, and the burden on local landowners would seemingly increase.

Next, by allowing local governments to play an active role in land use decision-making, specific locally-based problems may be addressed without

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66. *Id.* at 633.

67. *Id.* at 634 (quoting City of Cape Canaveral v. Mosher, 467 So. 2d 468 (Fla. 5th Dist. Ct. App. 1985)).

68. In *Machado*, Dade County's land use plan required a neighborhood area study to guide where, when, what kind, and what amount of nonresidential uses would be allowed in a specified residential zone. *Machado*, 519 So. 2d at 635. Dade's mandatory element of neighborhood study solidified the implication in the *Golden* opinion that it is most suitable to leave the details of a local land use plan to the "expertise of students of city and suburban planning." *Golden*, 285 N.E.2d at 301.

wasting state funds to research issues which are relevant only to a particular locality. Similarly, local governments are saved from dealing with burdensome regulations which should not have been applied to their area in the first place. Accordingly, the resources saved by the local governments may be better used to study and evaluate issues which are relevant to their area.

Since a local comprehensive plan is specific to one area, and is tailored by the people it affects the most, these plans should be firmly upheld. Furthermore, when a municipality has discovered, researched, evaluated, and adopted a plan to remedy a local land use problem, landowners should be required to strictly comply with the program in order to give the program a chance to succeed. Requiring such strict compliance is not unreasonable because a landowner has other remedies available to challenge the application of an ordinance to his property.[69] Therefore, requiring strict conformity of a developer's compliance with the comprehensive land use plan is a *must* for consistent and efficient land use regulation.

2. Takings

One of the most prominent challenges of land use regulations is that the regulation constitutes a taking without just compensation. One of private property's most fundamental protection is against its seizure for public use without "just" and "full" compensation. The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, embodies this protection by prohibiting the taking of private property for public use without just compensation.[70] This principle may also be found in the Florida Constitution which provides that "[n]o private property shall be taken except for public purpose and with full compensation therefor paid . . . ."[71]

The question that arises from these provisions is how far does the government have to go to have committed a taking. To answer this question one must begin with one of the landmark cases in land use taking challenges, *Pennsylvania Coal Co. v. Mahon.*[72] In *Pennsylvania Coal*, the Supreme Court was asked to determine whether Pennsylvania's Kohler Act was constitutional because it was alleged to have destroyed certain contract and

69. An example of an alternative remedy is a taking claim. *See* discussion *infra* part III.B.2.

70. U.S. CONST. amend. V.

71. FLA. CONST. art. X, § 6(a).

72. 260 U.S. 393 (1922).

property rights of a property owner protected by the *Constitution*.[73] The Court initially recognized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[74] Accordingly, the Court held that the general rule is, although "property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[75] Although not stated as such, the Court seemed to use a balancing test, weighing the harm suffered by the property owner against the societal gain, which requires an independent analysis of the facts and circumstances relevant to each case.[76] Unfortunately, this rule does not provide a concrete test upon which valid land use regulations may be distinguished from invalid regulations.

In a more recent decision, the Eleventh Circuit Court of the United States Court of Appeals reversed a federal magistrate's decision that the adoption of a comprehensive land use plan effectuated a taking against the property owners entitling them to just compensation.[77] The case involved approximately forty acres of waterfront land which the property owners sought to develop for single-family residences. However, in 1984, Lee County adopted a comprehensive land use plan which classified the Reahard's property as a "Resource Protection Area" and limited development of the parcel to a single residence.[78] The Reahards did not challenge the plan's classification of their property, conceding that it was a valid exercise of police power; however, they did allege that the classification interfered with their reasonable investment-backed expectations entitling them to monetary compensation.[79]

As a threshold issue, the court noted that the monetary compensation claim must be ripe for review.[80] Specifically, the landowner must have obtained a final decision regarding the application of the regulation to his property, and he must have exhausted all state procedures available for

73. *Id.* at 412.

74. *Id.* at 413.

75. *Id.* at 415.

76. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (discussing balancing of interests in takings cases).

77. Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), *cert. denied*, 115 S. Ct. 1693 (1995).

78. *Id.* at 1133.

79. *Id.* at 1135. It is interesting to note that the Reahards inherited the property from Mr. Reahard's parents who were not parties to the suit. *Id.* at 1133.

80. *Id.* at 1135 n.7.

obtaining just compensation.[81] Once the threshold questions were satisfied, the court employed the two tests to determine whether a land use regulation is a taking.[82] First, the regulation must substantially advance a legitimate state interest.[83] Second, the regulation must not deny an owner all "economically viable use of his property."[84] The court bypassed the first test because Reahard conceded that Lee County's comprehensive plan was a valid exercise of police power which substantially advanced a legitimate governmental interest.

The second test of whether the owner has been denied economically viable use of his property is more difficult. The two factors that the court determined must be analyzed by the fact finder are "(1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations."[85] The court remanded the case for further proceedings to analyze the above factors.[86]

It would seem then that the two-part test as illustrated in *Reahard*, provides us with the type of analysis which would be applied in a concurrency challenge. Concurrency regulations are essentially land use regulations which can be so restrictive on a property as to render a taking. For example, consider a situation in which a developer would like to construct single-family residences on a forty-acre parcel of raw land, zoned residential. The municipality, in which the land is situated, has just adopted a comprehensive land use plan in which one of its mandatory elements requires that a public elementary school be located within two miles of every new development. Unfortunately for our developer, though, the nearest public elementary school is five miles away. Accordingly, the developer's permit is denied. What is the developer to do now? Should she have to build the school herself? What if there is no land within two miles which would be suitable for an elementary school? Should she have to dedicate part of her land for its construction? May she bring suit for a taking?

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81. *Reahard*, 968 F.2d at 1135 n.7.

82. These two tests originated in the opinion of Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

83. *Reahard*, 968 F.2d at 1135 (citing *Nollan*, 483 U.S. at 834).

84. *Id.*

85. *Id.* at 1136 (citing Bowen v. Gilliard, 483 U.S. 587, 606 (1986)). The court vacated the judgment and remanded the case for new proceedings because the findings of fact by the magistrate were insufficient to make a proper taking analysis. *Id.* at 1137.

86. This case was later vacated on ripeness grounds. *See* Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1693 (1995).

If she challenges the ordinance as a taking without just compensation, then according to the *Reahard* court the two part takings test will apply.[87] The first part of the test involves a determination of whether the concurrency regulation "substantially advances a legitimate state interest."[88] The state's "legitimate interest" in educating the children of the state is arguably "substantially advanced" by the concurrency element requiring public elementary schools to be located within two miles of the new development. Thus, the first prong of the test should be satisfied.

The second prong requires that, for a taking to occur, the developer must be denied all, or substantially all, economically viable use of her property. She would claim that the regulation precludes her from building any houses on it which happens to be its highest and best use and, therefore, the regulation denies her the right to all economically viable use of her property. However, the court would probably consider several factors centering on the nature of the property itself. For instance, how has the land previously been used? For what other uses could it be developed? What is the history of its zoning? What were the reasonable investment-backed expectations of the landowner?

In this hypothetical, the court will probably not deem the regulation a taking because of the mere fact that the property owner could not put her land to its highest and best use. So long as she can make some economically viable use of her property, there will be no taking. However, the preceding factors must also be considered.

For example, suppose she purchased this forty acres while it was being used as a private hunting ground. Notwithstanding its present use, because the property's zoning classification allows single family residences to be built, the change in the nature of its use alone does not present a problem. However, the ordinance requiring the elementary school imposes a factor which could substantially affect the value of the property. But, the requirement itself does not change the nature of the property to the extent that it precludes the development of new homes. Thus, it would be difficult to establish a taking on this basis alone.

The history of the property's zoning is another important consideration as well. Suppose the property has been zoned residential and subject to the ordinance for several years, but the growth of the surrounding community had only recently reached this property necessitating its development. It would seem that the lack of development could be attributed to the lack of

87. Of course, she would first have to satisfy the threshold requirement by exhausting all procedural options. *See Reahard*, 968 F.2d at 1135 n.7.

88. *Id.* at 1135.

demand for new housing in the community, not the ordinance. However, once the community's growth reaches the property, the ordinance will be a significant factor in the property owner's decision of whether to build.

Similarly, if the property is zoned residential concurrent with the need for new housing in the community, and the ordinance is in effect when the property is purchased, then the regulation has not imposed any new burden. Moreover, this ordinance should have been factored into the development costs and the purchase price. Thus, if these considerations were ignored by our developer, then her error could be financially devastating, and it would be unlikely that the court would force the government to account for her mistake via a taking.

Next, when considering a landowner's "reasonable investment-backed expectations," the effect of the regulation on the property after it is passed plays a very important role in the analysis. As previously indicated, if a purchaser of land ignores existing regulations in his or her computation of property value, the consequences could be financially devastating. However, assuming our developer purchased the property prior to the ordinance's adoption, the effect on her "reasonable investment-backed" expectations generated by the ordinance must be determined.

Suppose she financed the property with a thirty-year amortized, "interest-only" loan, with a balloon payment due in five years. It is quite possible, that the county will not build an elementary school within the requisite radius in the next five years. Accordingly, she will be unable to develop her property in time to make her balloon payment. In other words, the ordinance would preclude her from developing her property because without the construction of the school, she will not be given a development order; and as she is unable to develop her land, she will probably be unable to meet her loan obligations. Consequently, if the ordinance was imposed after she purchased (and financed) the property, her reasonable investment-backed expectations presumably did not include factoring for the existence of an elementary school. Thus, in this situation, her reasonable investment-backed expectations appear to have been abrogated which bodes strongly in favor of the premise that the government has imposed a taking of her property.

Another factor to consider is the alternative development options available to her. Obviously, she could continue to operate the property as a private hunting ground, but this is not the reason she purchased it. One option she may have, depending on road locations and the zoning classifications of the surrounding area, is to attempt to rezone the property or apply for a variance. Secondly, she could hold the property until a school is built

within the requisite radius, and then develop or sell at a higher price.[89] A further option is for her to build the school herself. This, however, is a very unlikely option due to the relatively small piece of land she is developing. Considering the high cost of constructing a school, it is improbable that she will be able to build enough homes on forty acres so that she could allocate the school's cost into the purchase price of each new home and still make a profit. On the other hand, if a developer purchases one thousand acres to develop single family homes, it seems much more probable that he will have the resources necessary to construct the school(s), and that, due to the volume of homes that can be built on one thousand acres, he could allocate the cost of the school(s) into the purchase price of each new home and still realize a profit.

In sum, when purchasing a piece of property, it is important for the developer to consider all regulations which currently affect the property and all possible development alternatives, because that is what a "reasonable" developer would do if he or she expects to make a profit; and perhaps most importantly, that is what a court will consider in determining the developer's "reasonable investment-backed expectations."

Next, suppose that the municipality has recently allocated capital expenditures in its long-term budget for the school to be built five years from now, and the property is otherwise in compliance with all concurrency requirements. May she commence with her development? Should she have to wait an interim period? What if the budget included no time frame of when the school would be built? How long would be reasonable? These questions involve temporary takings as discussed in the next section.

3. Temporary Takings

The leading Supreme Court case in this area is *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[90] In this case,

89. However, due to the substantial risks involved, such as the county not building a school, this is probably not an advisable action. Arguably, though, if the school is built, the property value will rise as there is one less hurdle to overcome in the development process. Accordingly, she could realize a profit by selling the property if she is willing to take the risk of playing the "waiting-game." If, however, the ordinance was not in existence when she bought the property, then it was presumably not a factor in the purchase price. Thus, once the school is built (after the adoption of the ordinance), the value of the property (everything else remaining the same) should equal her purchase price, and she will break even. The "waiting-game" option, in the opinion of the author, is a very risky one and not advisable to the "reasonable" developer.

90. 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990).

the church owned land in a canyon along the banks of a natural drainage channel for a watershed area which it used as a retreat known as "Lutherglen." Much of the watershed area burned in a forest fire creating a serious flood risk. Such flooding soon occurred destroying the entire site. Consequently, Los Angeles County enacted an ordinance prohibiting construction or improvements on property located within the outer boundary lines of the interim flood protection area, which encompassed Lutherglen, to prevent further loss of property or life.[91]

The church filed suit against the county claiming, inter alia, that the ordinance denied the church of all use of its "Lutherglen" property.[92] The issue which ultimately arose was whether the Just Compensation Clause of the Fifth Amendment requires the government to pay for "temporary" regulatory takings.[93] Specifically, the Court had to decide whether, when an ordinance denies a property owner all use of its property and the ordinance has yet to be declared unconstitutional, the government must compensate the landowner from the initial point of deprivation.[94]

The Court initially examined the relevant language of the Fifth Amendment of the United States Constitution: "private property [shall not] be taken for public use, without just compensation."[95] Indicative in this language, the Fifth Amendment does not prohibit takings of property; however, it does condition such governmental action on the provision of "just compensation" being paid to the affected landholder.[96] It also noted that the Fifth Amendment was not designed to limit valid governmental interference in private property rights.[97]

The Court restated the general rule laid down in *Pennsylvania Coal Co.* that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[98] Furthermore, when enforcing such a valid regulation, the government should not force individual property owners to "bear public burdens which, in all fairness and justice, should be

91. *Id.* at 307.
92. *Id.* at 308.
93. *Id.* at 314.
94. *Id.* at 312. The court does not actually answer the questions of whether the property owner was denied all use of the land or whether the ordinance was unconstitutional. It merely determines whether such a remedy exists. *First English*, 482 U.S. at 312.
95. U.S. CONST. amend. V.
96. *First English*, 482 U.S. at 314-15.
97. *Id.* at 315.
98. *Id.* at 316 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

borne by the public as a whole."[99] It seems, then, that regulations imposed on land will not be deemed a taking so long as they are reasonable.

However, once a taking has been established, the government still has the ability to amend the ordinance, repeal it, or actually pay just compensation. But merely exercising its ability to amend or repeal the ordinance does not eliminate the fact that the property was subject to a "taking" while the ordinance was in effect. Accordingly, the *First English* Court held that once an ordinance has been found to effect a "taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[100]

This decision has been followed by the state and federal courts in Florida. In *Villas of Lake Jackson v. Leon County*,[101] the district court ruled that the Florida courts have construed the *First English* decision as mandating a compensation remedy for cases to the extent that a taking has been found to result from the enforcement of a confiscatory ordinance.[102] It concluded that after *First English*, "it is now certain that a property owner in Florida has a state remedy for compensation for the period of the taking until the regulation is amended or withdrawn."[103]

Similarly, in *J.T. Glisson v. Alachua County*,[104] the court upheld the constitutionality of an amendment to Alachua County's Comprehensive Plan which placed significant development restrictions on certain environmentally sensitive property owned by the appellants.[105] The court stated that for a landowner to show that a taking exists, he must have "no available beneficial use of his property under the land use ordinance."[106] Moreover, the court cited *First English* when it noted that once a taking is found the government has a duty to compensate an aggrieved landowner for the period that his property was affected by the ordinance, even if the ordinance is repealed.[107] Accordingly, it seems clear that a remedy for a temporary

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99. *Id.* at 319 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

100. *Id.* at 321.

101. 796 F. Supp. 1477 (N.D. Fla. 1992).

102. *Id.* at 1482.

103. *Id.* at 1483.

104. 558 So. 2d 1030 (Fla. 1st Dist. Ct. App.), *review denied*, 570 So. 2d 1304 (Fla. 1990).

105. *Id.* at 1032-33, 1038.

106. *Id.* at 1036 (citing Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977, 982 (9th Cir. 1987)).

107. *Id.* (citing *First English*, 482 U.S. at 321). The court treated this case as a facial challenge, however, because the property owners had not satisfied the threshold issue of ripeness. The record reflected that "no individual appellant-landowner ha[d] applied for or

taking exists in Florida, and may therefore be used when challenging a concurrency regulation. Thus, to successfully challenge a concurrency regulation via a takings claim, the landowner must demonstrate to the court that the regulation does not substantially advance a legitimate governmental interest or that the ordinance denies him all economically viable use of his property.

By applying the rationale of the above decisions to our hypothetical, the first question to ask in challenging the ordinance is whether, by not making a provision for the construction of an elementary school within a reasonable period of time, the municipality has effected a taking against the developer. Assuming that it has effected a taking, and the municipality does not amend or repeal the ordinance, the municipality must pay the developer the reasonable value for the use of all her property.

However, once the city amends its budget to provide for the construction of the school, the question is, how much of a delay to the developer before a development order is issued is reasonable? The case law seems to indicate that this question will be answered on a case by case basis, depending on the circumstances.[108] If the delay is determined to be unreasonable, then there is at least a temporary taking and the government must pay just compensation for the period beginning with when the regulation took effect against our developer's property. However, if the delay is deemed reasonable, then no taking has occurred and she is entitled to no compensation.

C. *"Even-Swap"—A Landowner's Option to Circumvent Concurrency?*

A new option available to a landowner in the concurrency context has reared its head and requires the landowner to bargain with government officials in order to gain development rights. An example of this is seen in Jacksonville in a "swap" made between the city and a family owning several hundred acres within the city.[109] In exchange for the city crediting four

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been denied a development proposal, rezoning request, or variance from the development regulation[s]" since the adoption of the amendment. *Id.* at 1036. *See generally* City of Jacksonville v. Wynn, 650 So. 2d 182, 187-88 (Fla. 1st Dist. Ct. App. 1995) (holding that landowner must obtain final judgment regarding application of challenged ordinance to property and must utilize all state procedures providing relief for a taking without compensation, before inverse condemnation claim is ripe for review).

108. *See* Golden v. Planning Bd., 285 N.E.2d 291, 302 (N.Y. 1972).

109. Kathy Horak, *Skinners Give City 150 Acres*, BUS. J.-JACKSONVILLE, Nov. 26, 1993, *available in* WL, ALLNEWS Directory, 1993 WL 3026987.

thousand vehicle trips on "busy" nearby roads to a 460 acre parcel of undeveloped land owned by the family, the family donated a 150-acre piece of property to the city as right-of-way for the extension of a state road.[110] Although this family had no immediate plans to develop the 460 acres, the property's value was increased and it was easier for them to sell the property to a developer as an important concurrency requirement was now satisfied.[111]

This does not appear to be an isolated incident. This family alone had several other similar deals planned with the city, and apparently has set a precedent because many other landowners are freely negotiating with the city to bargain for development rights.[112]

This type of bargaining seems to directly contradict the intent of the legislature in adopting the Local Government Comprehensive Planning and Land Development Act ("the Act").[113] To illustrate, if the purpose of concurrency is to time the growth of development to the government's provision of certain facilities and services, i.e., roads, then how is this purpose furthered by allowing a property owner to develop property that does not have roads capable to support the increase in traffic? Increasing the capacity of roads in another area seems to condone a theory of "no-net-increase" to the overall usage of the city's roads; however, it does not seem wise or synonymous with the Act's intent to sacrifice the resources of one area of the city merely to benefit another area of the city.

Suppose, for example, that a property owner wants to develop a certain piece of property and the roads supporting it are capable of a capacity of up to 5000 "trips"[114] attributable to this property. If the property owner's proposed development will create 10,000 trips, then the development order will presumably not be issued until the roads are capable of handling the extra 5000 trips. Suppose instead that the landowner donated a piece of property to the city on the other side of town for the construction of a new road which will have no effect on the capacity of the roads supporting the proposed development in exchange for a credit of 5000 trips being allocated to his development. He is now free to secure a development order (assuming all other permit obstacles are met) even though the surrounding roads will be subject to double their intended capacity.

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110. *Id.*
111. *Id.*
112. *Id.*
113. *See* FLA. STAT. § 163.3161 (1995).
114. For example, one single family home could be classified as creating 2.5 "trips."

This option does not make sense to this author. We cannot allow one part of the city to benefit at the expense of another part of the city and still maintain consistency with a local comprehensive plan. Even if the city officials claim that their actions were in conformity with the local comprehensive plan, who is to be the judge? Can we really expect the general public, in a public hearing, to be able to distinguish between the pitfalls of a "no net-increase" in overall usage and the statute's true intent, that each area of the community be treated consistently and in conformity with the local comprehensive plan?[115] What if the area which will suffer is composed of citizens unable to afford adequate representation while the area which will benefit is composed of affluent citizens able to afford the best representation?

D. *Should the State Impose a Mandatory Concurrency Element for Schools?*

Due to the continuing population growth of Florida, several school systems throughout the state have been forced to consider several alternatives to counter-act the effects of over-crowding in schools.[116] Many options have been suggested, ranging from increasing sales taxes to scheduling school days in double sessions.[117] Perhaps the most dynamic suggested alternative would be to include schools as a mandatory element in the state's concurrency requirements. The problem this brings, though, is who pays for these new schools?

One possibility, which has been proposed in Pasco County, entails the exaction of school impact fees being imposed against the development of any new homes.[118] In general, this would entail a fee being charged for the construction of new homes; and such fees would be earmarked

115. It is entirely possible that a trade for development rights could be in conformity with the local comprehensive plan, but there should be a clear relationship between the private and governmental action. In other words, the compensation given to the city in exchange for development rights should have a direct relationship with the benefit to the immediate community. For example, if in the Jacksonville example, the land donated by the family would have extended a highway to compensate for the increased travel created by developing that property, then the exchange would seem to be justified.

116. Peter Mitchell, *After Funding Setbacks, Schools Prepare Painful Lessons for Parents*, WALL ST. J., Nov. 8, 1995, at F1, *available in* WL, ALLNEWS Directory, 1995 WL-WSJ 9907304.

117. *Id.*

118. *Id.*

specifically for the construction of new schools necessitated by the new development.[119] This proposal, however, is not a novel one.

In *St. Johns County v. Northeast Florida Builders Ass'n*,[120] the court considered "whether St. Johns County could impose an impact fee on new residential construction to be used for new school facilities."[121] After conducting a careful study calculating how to maintain an acceptable level of public facilities in the county, including schools, a method of allocating the cost of providing these new school facilities to each unit of new residential development was proposed.[122] Incorporating this proposal, an ordinance was enacted which specified that:

> no new building permits will be issued except upon the payment of an impact fee. The fees are to be placed in a trust fund to be spent by the school board solely to "acquire, construct, expand and equip the educational sites and educational capital facilities necessitated by new development."[123]

The ordinance recited that it would be applicable within both incorporated and unincorporated areas of the county, but not in municipalities in which an interlocal agreement to collect the impact fees had not been entered into with the County.

To determine whether the imposition of this impact fee was valid, the court invoked the "dual rational nexus test."[124] As the name indicates, two requirements must be satisfied:

> There must be a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this later requirement, the ordinance must specifically

119. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 320 (Fla. 1976) (authorizing municipality to exact impact fees to meet proportion of costs of expanding public facilities attributable to new development, so long as fees are limited to meeting costs of expansion), *cert. denied*, 444 U.S. 867 (1979).

120. 583 So. 2d 635 (Fla. 1991).

121. *Id.* at 636. This is an issue of first impression for the court. *Id.* at 638.

122. *Id.* at 637.

123. *Id.* (quoting ST. JOHNS COUNTY, FLA., ORDINANCE 87-60, § 10(B) (1987)).

124. *St. Johns County*, 583 So. 2d at 637.

> earmark the funds collected for use in acquiring capital facilities to benefit the new residents.[125]

The court, in considering the first prong of the test, determined whether St. Johns County demonstrated that there was a reasonable connection between the need for more schools and the growth in population attributable to the new development.[126] The parties did not dispute that the county must expand its facilities commensurate with the rate of new development to maintain its current levels of service.[127] However, the challengers to the ordinance argued that not all new residents will have children who will benefit from the new schools.[128] The court countered this argument by pointing out that even though benefits from fire protection and parks will not be used by every citizen, the city must still be in the position to serve every dwelling unit.[129] Thus, the court held that the ordinance met the first prong of the rational nexus test.[130]

However, the court determined that the second prong of the test was not met because the ordinance did not specifically earmark the funds collected for use in acquiring capital facilities strictly to benefit the new residents who actually paid the fees.[131] In other words, there was no express provision in the ordinance ensuring that the impact fees would be kept from being spent for the construction of new schools to accommodate new development in municipalities which have not entered into the interlocal agreement.[132] For example, if a municipality within the county chose not to impose this impact fee on its citizens by not entering into a collection agreement with the county, then under the ordinance, it is entirely possible that fees collected in another part of the county will be spent to build a new school in the municipality which is exempt from the impact fees. This possibility, the court decided, was not acceptable. Consequently, it held that no impact fees could be collected under this ordinance until "substantially all of the population of St. Johns County is subject to the ordinance."[133]

The St. Johns County ordinance also included a provision that essentially allowed a development to be exempt from the impact fee if it

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125. *Id.*
126. *Id.* at 638.
127. *Id.*
128. *Id.*
129. *St. Johns County*, 583 So. 2d at 638.
130. *Id.* at 639.
131. *Id.*
132. *Id.*
133. *Id.*

could show that it would be comprised totally of families without children attending public schools, that is, families with children attending private schools only, families without children, adult communities, etc.[134] However, due to the requirement that these families would have to pay the impact fees if they subsequently have children who will attend public schools while residing in their homes, the court determined that the impact fees had the potential of being "user fees" in that the fees seemed to be based solely on whether any children attending public schools resided on the property.[135] Thus, invoking the severability clause, the court struck this provision from the ordinance, because the court determined that imposing "user fees" on public education collides with Florida's constitutional requirement[136] of free public schools.[137]

It seems that the St. Johns ordinance failed on a mere technicality. However, by imposing this strict test, the court insured that impact fees may not be imposed at the whim of government officials. Ironically, instead of attempting to accommodate every party who "perhaps" should not be subject to the fee, if the County would have been more aggressive in drafting the ordinance, i.e., eliminating the exceptions and requiring no interlocal agreements, the ordinance apparently would have survived. From this opinion, however, it seems clear that impact fees earmarked for construction of new schools to keep up with the demands caused by new development may be exacted against new home construction with a carefully drafted ordinance.

Although this decision seems to have provided a supplementary means of providing revenue to construct new schools, it did not solve the potential for intergovernmental conflicts. As pointed out by C. Allen Watts, if municipal consent is required to impose a county-wide school impact fee, then a 51 percent majority of a small municipality's voters could effectively veto this type of fee county-wide.[138] However, if there is no procedure for collecting the fees, then the government will not receive the revenue. Thus,

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134. *St. Johns County*, 583 So. 2d at 640.

135. *Id.*

136. FLA. CONST. art. IX, § 1.

137. *St. Johns County*, 583 So. 2d at 640. The court did note that it would have no problem with an exemption for residential adult facilities in which land use restrictions were placed on the property that prohibited minors from residing within the community. *Id.* at 640 n.6.

138. C. Allen Watts, *Beyond User Fees? Impact Fees for Schools and . . .*, 66 FLA. B.J. 56, 59 (Feb. 1992).

there must be a next step. Is this next step a state-wide mandate for schools as a mandatory concurrency element?

IV. CONCLUSION

It is quite apparent that Florida's Local Government Comprehensive Planning and Land Development Regulation Act is appropriately named. The substance embodied from its original form and subsequent amendments reflect many years of study, experience, and planning. As a state growing at such an explosive pace, land use controls are imperative to Florida and its government officials. The legislature has provided a means by which each local government entity is assured of its ability to diagnose a problem and remedy it according to its individual needs. At the same time, however, Florida as a whole is assured of consistency and uniformity throughout its land use decisions.

The legislature has mandated that certain elements be included in each local government's comprehensive plan. Of course, this does not preclude a plan from including other elements not in the state's plan. Rather, the plan must merely be consistent with it. Presumably, the mandatory elements found in Florida's concurrency statute[139] are what the legislature has determined to be absolutely necessary on a statewide basis for a community's health, benefit, and welfare. However, as with anything else, with changing conditions comes changing needs. Thus, the logical reason the legislature withheld some control over local comprehensive plans is so that it retains the ability to make changes whenever a statewide need arises.

It is becoming all too obvious that the conventional approach of hoping that government will expand its facilities in time with the needs of the community is not working.[140] It seems that it is time for the legislature to look at this problem and consider the concurrency alternative. Although concurrency regulations have been criticized as overly bureaucratic and time-consuming for the developer, should the prospect of our children's

139. FLA. STAT. § 163.3180.

140. *See, e.g.*, Mitchell, *supra* note 116. A sign at Suntree Elementary School in Melbourne, Florida warns newcomers to the area that this new school is overcrowded and enrollment is capped so any new students must be bused to other schools. The school district in Broward County, Florida is forced to consider a year-round calendar, double sessions, busing students to distant schools, and hauling in portable classrooms to be placed on playing fields and parking lots due to a growth of 10,000 students per year. The school district in Leon County, Florida, by redrawing boundaries to ease school overcrowding, could mean eliminating drop-out prevention and advanced-study programs to accommodate the influx of new students.

education be undermined at the expense of "progress"? Accordingly, this author proposes a statewide mandate be included in Florida's concurrency law that requires capital expenditures for schools be provided prior to the construction of new residential development.

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